

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

APPEALS COURT No. 2017-P-0937

Middlesex County.

Julio Acevedo
Plaintiff-Appellee,

v.

Musterfield Place, LLC, FHA Musterfield Manager, LLC and
Framingham Housing Authority
Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT, MIDDLESEX COUNTY.

**Application of Defendants-Appellants
Musterfield Place, LLC, FHA Musterfield Manager, LLC and
Framingham Housing Authority to Obtain Direct Appellate
Review.**

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APPLICATION FOR DIRECT APPELLATE REVIEW

I. REQUEST FOR DIRECT APPELLATE REVIEW

Defendants Musterfield Place, LLC, FHA Musterfield Manager, LLC and Framingham Housing Authority (hereinafter, "Appellants") request Direct Appellate Review ("DAR") of this action by the Supreme Judicial Court pursuant to Mass. R.A.P. 11.

A matter is appropriate for DAR when the questions presented by the appeal are "(1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court in the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court." *Mass. R. App. P. 11(a)*.

This matter was reported to the Appeals Court in accordance with *Mass. R. Civ. P. 64(a)* after a judge in the Superior Court (Kirpalani, J.) denied these Appellants' Motions for Partial Summary Judgment. In so doing, the Court expressly recognized that the issue raised by the Motion was one of first impression and of substantial public interest:

"[h]ere, the issue whether "controlled affiliates" qualify as public employers under the Tort Claims Act is a matter that will likely impact the remainder of the case, including whether presentment is required and whether certain defenses under the Tort Claims Act will be available. **Furthermore, the matter has a potentially broad impact throughout the Commonwealth, and it appears that no Massachusetts court has previously addressed the issue.**"

See, Memorandum of Decision and Order on Defendants' Motion for Partial Summary Judgment, included in the concurrently filed Appendix as **Exhibit A**, at p. 6 (emphasis added).

Simply stated, the issue raised by this appeal is whether a "controlled affiliate" of a public housing authority - a limited liability corporation, created under a state regulatory scheme for the sole purpose of making it possible to take advantage of the Federal low-income housing tax credit program in order to fund a major public housing redevelopment project - should be entitled to the protections of the Massachusetts Tort Claims Act,¹ where the controlled affiliate is required by law to act in the same manner and to the same effect as if it **were** a public housing authority.

¹Public housing authorities are "public employers" under the Tort Claims Act, *Mass. Gen. Laws*, ch. 258. See *Commesso v. Hingham Housing Authority*, 399 Mass. 805 (1987).

II. PRIOR PROCEEDINGS

This is a premises liability action brought against the Framingham Housing Authority. The plaintiff is a tenant at the Authority's 110-unit family public housing development known as The Musterfield at Concord Place and claims to have slipped and fallen down a flight of stairs inside his apartment. In Massachusetts, public housing authorities are "public employers", *Commesso v. Hingham Housing Authority*, 399 Mass. 805 (1987), and, accordingly, personal injury claims of the sort involved here are subject to the terms, conditions, and limitations of the Massachusetts Tort Claims Act, *Mass. Gen. Laws*, ch. 258; most notably, the limitation of any damages award to \$100,000. *Id.*, § 2.

In the present case, in an apparent effort to circumvent the \$100,000 damages cap, the plaintiff also sued Musterfield Place, LLC and FHA Musterfield Manager, LLC (collectively referred to herein as the "Musterfield entities"), two Massachusetts limited liability companies that are described in the Complaint as "owning" or "controlling" the Musterfield development. As these two corporate entities are not, strictly speaking, "public employers" under ch. 258, Defendants anticipated that the

plaintiff would argue that he is entitled to a damages award in excess of \$100,000 as against each of them. Accordingly, the Defendants pursued a Motion for Partial Summary Judgment seeking a ruling from the Superior Court that the Musterfield entities should be deemed to be public employers for purposes of the Tort Claims Act.

Musterfield Place, LLC is what is known under Massachusetts law as a "controlled affiliate" of the Framingham Housing Authority. 760 C.M.R. 4.15. It was created solely and exclusively for the purpose of enabling the Framingham Housing Authority to secure funding from the private sector for a substantial rehabilitation of the Musterfield housing development that would not otherwise have been available from the public treasury. It is, for all intents and purposes, a paper corporation - a legal fiction - created to hold title to the Musterfield property for the sole purpose of making low-income housing tax credits available to private investors in the rehabilitation project. See generally, <http://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf>. Actual and legal control over the management of the public housing development remains with the participating public housing authority. FHA Musterfield

Manager, LLC was created to be the managing agent for that purpose; the sole member of FHA Musterfield Manager, LLC is the Framingham Housing Authority. Thus, all of the functions of a public housing authority in managing, maintaining, and operating a public housing development continue to be carried out exclusively by employees of the Framingham Housing Authority. In fact, the Musterfield entities have no employees.

On May 31, 2017 the Superior Court issued an Order denying the Defendants' Motion for Partial Summary Judgment and reporting its decision to the Appeals Court. A copy of the docket of the Superior Court is included in the Appendix as **Exhibit B**. The appeal was docketed in the Appeals Court on July 19, 2017.

III. FACTS RELEVANT TO THE APPEAL

The Order contains a clear and comprehensive synopsis of the material facts. Indeed, the facts are not in dispute. Rather, this appeal solely presents a question of law. However, understanding the factual context of this case and the relationship of the defendant entities is critical to deciding the question of law at issue. As such, a detailed description of the facts giving rise to this case and the relationship of the defendant entities is set forth below.

A. The Incident

This is a premises liability case, in which the plaintiff claims to have slipped and fallen on an interior stairway in his apartment unit located at 68 Pearl Harbor Road, Framingham, Massachusetts, on February 22, 2013. The Plaintiff claims that he slipped while descending the stairs as a result of the slippery surface of the stairs. A copy of the Superior Court Complaint is included in the Appendix as **Exhibit C**.

The Plaintiff alleges that each defendant "owned and controlled the premises at 68 Pearl Harbor Road, Framingham, Massachusetts, property which was and is part of a housing development known as The Musterfield at Concord Place." See, **Exhibit C** at Counts I, II, III, IV, V and VI, ¶1. The Plaintiff further alleges that each defendant "negligently rented the property at 68 Pearl Harbor Road, Framingham, Massachusetts, in a defective and dangerous condition, so as to cause the plaintiff to suffer severe personal injuries on or about February 22, 2013." See, the Superior Court Complaint at Counts I, III, and V, ¶2. Finally, the Plaintiff alleges that each defendant breached the covenant of habitability by renting the property at 68 Pearl Harbor Road, Framingham, Massachusetts in a defective and dangerous condition. Counts II, IV, and

VI, at ¶2. As a result of the slip and fall, the Plaintiff claims to have suffered personal injury, primarily to his lower back, which required surgery. The Plaintiff seeks to recover damages well in excess of \$100,000.

B. The Relationship of the Defendant Entities

On or about January 26, 2015, the Plaintiff filed the instant lawsuit naming each of the three Defendants as parties to the action. As set forth above, the Plaintiff identifies each of the Defendants as an owner of the premises at 68 Pearl Harbor Road, Framingham, Massachusetts. The relationship among the Defendants is, in fact, a purposefully developed ownership structure described in a set of Housing and Economic Development regulations entitled, "Transfer of Existing Public Housing Developments to Controlled Affiliates for Substantial Rehabilitation". See, 760 C.M.R. 4.00 et. seq. In compliance with the regulatory scheme set forth in sections 4.15 -4.16, discussed in more detail below, on October 13, 2009, the Framingham Housing Authority, as owner of the Pearl Harbor Development located at 68 Pearl Harbor Road, Framingham, Massachusetts [the "Property"], deeded the Property to its "controlled affiliate," Musterfield Place, LLC.

The transfer of legal ownership of the Property was done for the sole purpose of enabling the Framingham Housing Authority to obtain funding needed for a substantial rehabilitation project of the Property. However, regardless of this "paper" transfer of ownership the Property, the Framingham Housing Authority has, at all relevant times, maintained full control of the management, maintenance and operation of the Property.

Section 4.15 of the regulations authorizes a public housing authority to submit an application to the Department of Housing and Community Development [the "Department"] for the transfer of a housing project "which is in need of substantial rehabilitation, to a controlled affiliate of the LHA [licensed housing authority] for purposes of securing additional financing, which in conjunction with any financing available from the Department, is necessary for paying the cost of substantial rehabilitation of the housing project." 760 C.M.R. 4.15(1). A "controlled affiliate" is defined by Section 4.01 of the regulations as "an entity with the power to own and manage residential real property of which and **over which actual and legal control shall be in an LHA**". 760 C.M.R. 4.01 (emphasis added). Simply put, the regulations authorize a public housing authority to transfer title to

an existing housing development to a "controlled affiliate" for the purpose of securing funding for the completion of a substantial rehabilitation project, so long as actual and legal control over the property and the affiliate remain with the public housing authority. This is the very process employed by the Framingham Housing Authority with regard to the Property where the incident in this case is alleged to have occurred.

Thus, in October 2009, the Framingham Housing Authority transferred ownership of the Property to its controlled affiliate, Musterfield Place, LLC; however, by the very definition of "controlled affiliate," the actual and legal control of the Property remains with the Framingham Housing Authority. The practical effect of this ownership structure is that Musterfield Place, LLC is record owner of the Property in name only. For all practical purposes the Framingham Housing Authority maintains actual and legal control of the Property, by way of its control over Musterfield Place, LLC.

C. The Transfer of the Property Was Done in Compliance with 760 C.M.R. 4.15

On August 26, 2009, as required by section 4.15, the Framingham Housing Authority submitted an application to the Department of Housing and Community Development seeking

approval to transfer its Pearl Harbor Development (the Property), to be known thereafter as The Musterfield at Concord Place, to Musterfield Place, LLC [the "Application"]. A copy of the Application is attached as **Exhibit D** to the Appendix. According to the Application, the Framingham Housing Authority determined that the Property was in need of substantial rehabilitation and contracted with a design team "to develop plans for the substantial rehabilitation of the Pearl Harbor Development in order to extend its useful life." *Id.* The estimated costs for the rehabilitation project exceeded modernization funding available from the Department. Thus, "in order to secure the necessary financing to perform the required renovations, the Framingham Housing Authority sought a combination of tax-exempt construction financing and federal low-income tax credits". *Id.* Specifically, the rehabilitation project for the Property was to be financed through five sources, one of which would be "an equity investment by an investor seeking benefits including a 4% low-income housing tax credit available to the Project pursuant to Section 42 of the Internal Revenue Code." *Id.*; Also, see generally, 26 U.S. Code § 42 (low-income housing tax credit). The complicated financing structure required to complete this transaction necessitated the transfer of

the Property to a "controlled affiliate" of the Framingham Housing Authority. See, **Exhibit D.**² In summary, the purpose of the transfer of the Property to a new ownership structure was to allow the Framingham Housing Authority access to funding for rehabilitation that would otherwise not be available. As discussed above, Massachusetts regulations specifically allow for the transfer of existing public housing developments to controlled affiliates for this purpose. See, 760 C.M.R. 4.15.

Here, the Framingham Housing Authority transferred the Property to a limited liability company, Musterfield Place, LLC. Musterfield Place, LLC was formed as a "controlled affiliate" of the Framingham Housing Authority in compliance with 760 C.M.R. 4.15 - 4.16. As owner of the Property, Musterfield Place, LLC is able to participate in the low income housing tax credit program ("LIHTC"). Musterfield Place, LLC, functions as the mechanism for

²The actual transfer of ownership is required to comply with Section 42 of the Internal Revenue Code affording the owner of low income housing the ability to receive certain tax credits distributed by the Department of Housing & Community Development. Further, the Framingham Housing Authority, a government entity, is exempt from federal tax liability, thus, would not be entitled to receive low income housing tax credits and/or benefit from such tax credits.

receiving the federal tax credits, then assigns those tax credits to its investor-member in exchange for capital contribution. Here, Musterfield Place, LLC is comprised of three members. FHA Musterfield Manager, LLC is the managing member of the LLC and owns .009% of the LLC. Red Stone Equity Manager is the special member owning .001% of the LLC. Finally, RESP Holding, LLC, is the "investor member." RESP Holding, LLC contributes private capital to Musterfield Place, LLC in exchange for its interest in the LLC (99.99%) and the low income housing tax credits. See, a copy of the Department of Housing and Community Development's (the "Department") September 16, 2009 letter of approval in accordance with 760 C.M.R. 4.16, attached to the Appendix as **Exhibit E**; See also, the Regulatory and Operating Agreement between the Framingham Housing Authority and Musterfield Place, LLC, attached to the Appendix as **Exhibit F**.

The change in ownership structure allowed the Framingham Housing Authority to utilize funding otherwise unavailable. For all practical purposes, the Property remained in full legal and actual control of the Framingham Housing Authority. In conjunction with the closing of the Musterfield Place, LLC transaction, FHA Musterfield Manager, LLC, a Massachusetts limited liability company,

whose sole member and manager is the Framingham Housing Authority, was created to serve as the managing member of Musterfield Place, LLC. FHA Musterfield Manager, LLC *"shall have full, complete and exclusive discretion to manage and control the business of the Musterfield Place, LLC, shall make all decisions affecting the business of the Musterfield Place, LLC and shall manage and control the affairs of the Musterfield Place, LLC."* See, Exhibit D (emphasis added); see also, Appendix at **Exhibit E** and **Exhibit F**. Additionally, as a condition for the transfer of the Property to the Framingham Housing Authority's controlled affiliate, the Framingham Housing Authority and Musterfield Place, LLC entered into an Amendment to the Contract for Financial Assistance [the "CFA"] and a Regulatory and Operating Agreement [the "R & O"], the terms of which specifically required compliance by the controlled affiliate "with the provisions of *Mass. Gen. Laws* ch. 121B and 760 C.M.R. §§ 4.00 et seq., 5.00 et seq., and 6.00 et seq. *in the same manner and to the same effect as if it were an LHA [licensed housing authority]*, subject to any waivers . . . given by the Department to the controlled

affiliate *as may be necessary for securing financing.*³ 760
C.M.R. 4.16(1)(a) (emphasis added); See, Appendix at **Exhibit E** and **Exhibit F**. In summary, this means that the Property, although technically "owned" by the controlled affiliate, must continue to operate as a public housing authority with the sole exceptions being whatever waivers "may be necessary for securing financing."

By its letter dated September 16, 2009, the Department informed Kevin Bumpus, then-Executive Director of the Framingham Housing Authority, that the Department approved the Authority's transfer of the Property to its controlled affiliate, Musterfield Place, LLC, in order to make possible a substantial rehabilitation of the development. In its approval letter, the Department determined that the transfer of ownership complied with the requirements of 760 C.M.R. 4.15 and made the following specific findings:

1. The FHA's 200-1 (Pearl Harbor) development is in need of substantial rehabilitation;
2. The costs of rehabilitation cannot be wholly financed by the Department;

³Notably, 760 C.M.R. §§ 4.00 et seq., 5.00 et seq., and 6.00 et seq., all set forth management and operations criteria applicable to public housing authorities. Section 4.00 discusses the General Administration of Local Housing Authorities; section 5.00 sets forth the Eligibility and Selection Criteria for individuals applying for public housing; and section 6.00 describes Occupancy Standards and Tenant Participation for State-Aided Housing.

3. The Owner [Musterfield Place, LLC] (the controlled affiliate) will be adequately financed and properly constituted;
4. ***The FHA will have effective legal control of the Owner [Musterfield Place, LLC];***
5. The FHA has complied with tenant participation requirements of 760 CMR 6.09(3) (g);
6. The financial plan is sound and likely to be accomplished; and
7. Any lien or mortgage on the land of the housing project will be reasonably necessary and shall be subordinate to the requirements set out in 760 CMR 4.16(1) (a).

See, **Exhibit E** (emphasis added).

The effect of this ownership structure is that the Framingham Housing Authority remains in "full, complete and exclusive discretion to manage and control the business of the Musterfield Place, LLC." According to its Certificate of Organization, the "business" of Musterfield Place, LLC is "the ownership and development of the state housing project known as Pearl Harbor located in Framingham, Middlesex, County, Massachusetts..." Attached to the Appendix as **Exhibit G** is a copy of Musterfield Place, LLC's Certificate of Organization. Thus, the practical result of this statutorily prescribed ownership structure is that the Framingham Housing Authority, although no longer the record owner of the Property, remains in full and complete control

of the Property for management, maintenance, and operational purposes.

Clearly, 760 C.M.R. 4.15 contemplates and intends that the Property be controlled, operated and maintained by the Framingham Housing Authority as a public housing development. Consistent with this legislative intent, despite the technical transfer of record ownership, the Property remains managed, operated and controlled by a public housing authority, **as** a public housing development. Therefore, tort claims arising from the operation, maintenance and/or management of the Property, such as the Plaintiff's claims in this action, are effectively claims against the Framingham Housing Authority, a ch. 258 public employer, and thus should be subject to the Massachusetts Tort Claims Act.

IV. ISSUES OF LAW RAISED BY THE APPEAL

Whether "controlled affiliates," created pursuant to 760 C.M.R. 4.15, specifically, the two Musterfield entities named as defendants in this litigation, should be deemed to be "public employers" for purposes of the Tort Claims Act, when they are created solely and exclusively for the purpose of enabling the Framingham Housing Authority to secure funding from the private sector for a substantial rehabilitation of the Musterfield housing development that

would not otherwise have been available from the public treasury, where actual and legal control over the management of the public housing development remains with the participating public housing authority, and where all of the functions of a public housing authority in managing, maintaining, and operating a public housing development continue to be carried out exclusively by employees of the Framingham Housing Authority.

V. ARGUMENT

A. The Massachusetts Tort Claims Act

The Massachusetts Tort Claims Act is the exclusive remedy, sets forth the procedure, and establishes the overall framework, for asserting tort claims against public employers. All claims for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his employment are subject to the requirements of the statute, *Mass. Gen. Laws*, ch. 258, § 1. A public employer can be held liable for the negligence of its employees while acting within the scope of their employment. *Id.*, §2. Public housing authorities are public employers under the statute. *Wheeler v. Boston Housing Authority*, 425 Mass. 509 (1998). In addition to setting forth a number of statutory immunities, ch. 258

limits damages for claims against public employers to \$100,000. *Id.*, §2.

In enacting the Tort Claims Act, the Legislature demonstrated an intent to be protective of the public funds, as reflected in the exclusion of punitive damages, pre- and post-judgment interest, and the \$100,000 limitation on damages awards. The overall legislative scheme ensures that victims of public employee negligence have access to a meaningful recovery, while simultaneously limiting a public employer's exposure to excessive liability. *See, Hallett v. Town of Wrentham*, 398 Mass. 550, 558 (1986); *quoting Irwin v. Ware*, 392 Mass. 745, 772 (1984).

B. The Massachusetts Tort Claims Act Should be Deemed to Apply to the Plaintiff's Claims As Against Each of the Defendants

In the instant case, in addition to naming the Framingham Housing Authority as a defendant, the Plaintiff has joined Musterfield Place, LLC and FHA Musterfield Manager, LLC, as "owners" of the Property. Presumably, this was done as an attempt to circumvent the \$100,000 damages cap set forth in *Mass. Gen. Laws*, ch. 258, §2. However, to treat the Property as privately owned would offend both the legislative intent of the statute, as well as the regulatory intent of 760 C.M.R. 4.15. Despite the

appearance of "private" ownership of the Property, it is still the Framingham Housing Authority that controls, manages, operates and maintains the Property. In fact, to enable the Authority to transfer ownership to its controlled affiliate, Musterfield Place, LLC, for the purpose of obtaining funding for its substantial renovation of the Property, section 4.15 requires that the Framingham Housing Authority create an ownership structure which explicitly obligates the Authority to maintain "actual and legal control" of its controlled affiliate, Musterfield Place, LLC. 760 C.M.R. 4.15(2).

The current ownership structure of the Property accomplishes this objective. The Framingham Housing Authority is the sole member and manager of FHA Musterfield Manager, LLC, the Managing Member, of Musterfield Place, LLC. Further, the management and operation of the Property has never changed from that of a public housing authority. All maintenance of the Property is performed solely by employees of the Framingham Housing Authority. Musterfield Place, LLC, the record owner of the Property, has no employees and is merely the "controlled affiliate" of the Housing Authority. Therefore, the only persons who operate, manage and maintain the Property are employees of the Framingham Housing Authority. Moreover, the Framingham

Housing Authority, in its management and control over the business of Musterfield Place, LLC, as "owner" of the Property, is required to ensure that Musterfield Place, LLC complies with the provisions of ch. 121B and 760 C.M.R. §§ 4.00 et seq., 5.00 et seq., and 6.00 et seq. **in the same manner and to the same effect as if it were a LHA [licensed housing authority]**". In addition, the regulations require that "the controlled affiliate shall be subject to the same procedures for securing approval of plans for substantial rehabilitation **as if it were a housing authority.**" *Id.*, § 4.15(3) (emphasis added). Finally, as if to emphasize the extent to which the record ownership of the property was considered to be more of a formalism than anything else, the regulations state that: "A housing project so rehabilitated by a controlled affiliate **shall be the real property of the LHA** for purposes of its exemption from real estate taxes." *Id.* (Emphasis added).

Clearly the process of "transferring" ownership of public housing property to a controlled affiliate for rehabilitation purposes, as proscribed by section 4.15, was **not** intended to convert existing public housing developments into privately owned property.

But treating the Musterfield defendants as something other than "public employers" would yield a number of

anomalous results. Most obviously, it would permit unlimited tort liability to lie against a paper corporate entity, with no employees, no management responsibilities, and no corporate purpose or authority other than to serve as a vehicle for making low-income housing tax credits available to private investors, in circumstances where the actual management, maintenance, and operation of the underlying property **as a public housing development** is indistinguishable from the management of the property by a conventional public housing authority whose liability would be capped by statute at \$100,000. This would be form-over-substance in the extreme, and would simply make no sense viewed against the backdrop of either chs. 121B or 258.

Second, it would result in not just the abrogation of the \$100,000 damages cap, but every other aspect of the Tort Claims Act, including the presentment requirement of section 2, the exclusive jurisdiction of the Superior Court over claims asserted against public employers contained in section 3, and the numerous affirmative defenses and immunities contained in section 10. Among the latter are the long-standing "discretionary function" defense (section 10(b)), the bar against claims of failure to provide adequate police or fire protection (sections 10(g) and (h)), and the bar against claims of failure to prevent the

violent or tortious conduct of third persons (section 10(j)). It is the clearly expressed public policy of the Commonwealth that those sorts of claims are either too speculative or impose too burdensome a duty of care on public employers to be viable as a matter of law. But those claims **would be** presumptively viable against "controlled affiliates" of public housing authorities if those affiliates (e.g., the Musterfield defendants) were considered to be "private" entities outside the reach of ch. 258. Moreover, eliminating the section 10 defenses as to "controlled affiliates", while permitting them in claims against conventional public housing authorities - often (as here) in the same case - would lead to confusion, conflicts of interest (fabricated and otherwise), and the possibility of irreconcilable rulings, verdicts, and judgments.

Third, there would be something unavoidably arbitrary in a finding that "controlled affiliates" were ineligible for ch. 258 protection, during the period of time when the controlled affiliate temporarily held record title to a particular property for rehabilitation funding purposes, but finding a conventional public housing authority eligible for those protections where such a funding mechanism had not been put in place. Residents in one public housing development would be required to prosecute

their claims against the housing authority within the framework of ch. 258; residents of another development, in the same city or town, sometimes across the street or literally abutting the other development, would experience no such restrictions, simply because the property had been temporarily deeded to the housing authority's "controlled affiliate". If a personal injury occurred a day after (or before) the creation of the "controlled affiliate", that claimant would stand on different, luckier (or unluckier) footing from someone injured on the same property, under the control of the same housing authority, the day before or after. And none of this, of course, would have anything even remotely to do with the management, operation, or maintenance of a public housing development, which would be indistinguishable in all cases. Only the temporary transfer of title to a corporate shell, accomplished solely for funding purposes, would be different. That should not be enough to gut the policy goals set forth in the Tort Claims Act.

For all of these reasons, the Tort Claims Act should apply to the claims asserted against each of the Defendants, including the Musterfield entities, and the Plaintiff's recovery should be limited in accordance with ch. 258, to \$100,000.

VI. WHY DIRECT REVIEW IS APPROPRIATE

As set forth at the outset of this Application, DAR is appropriate when the questions presented on appeal are issues of first impression or novel questions of law or of great public interest. The Superior Court's Order expressly acknowledges that the question of law at issue in this case, whether "controlled affiliates" qualify as public employers under the Tort Claims Act, is one of first impression, as no Massachusetts court has previously addressed the issue. Further, the Order recognized that determination of this question of law will potentially have a broad impact throughout the Commonwealth. As such, the issue is one of public interest. See, **Exhibit A** at p. 6. Consequently, this matter is appropriate for DAR.

In addition to the Superior Court's observations, regarding the significance of the legal question raised on appeal, whether or not a "controlled affiliate" should be treated as a public employer for purposes of ch. 258 will have significant ramifications for public housing authorities across the Commonwealth, and perhaps nationally.

As discussed above, the Massachusetts legislature enacted a regulatory scheme allowing public housing authorities to transfer title to an existing housing

development to a "controlled affiliate" for the purpose of securing funding for the completion of substantial rehabilitation projects. 760 C.M.R. 4.15. This regulatory scheme allows public housing authorities to form limited liability companies which will operate as controlled affiliates in compliance with 760 C.M.R. 4.15. The newly formed limited liability company is then eligible, pursuant to Section 42 of the Internal Revenue Code, to participate in the LIHTC. The limited liability company receives tax credits pursuant to the LIHTC which are then assigned to its investor-member in exchange for capital contributions used to fund the rehabilitation project. The LIHTC is the federal government's primary program for encouraging the investment of private equity in the development of affordable rental housing for low-income households. See, Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks, <http://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf>. The LIHTC program was established as part of the Tax Reform Act of 1986 and is commonly referred to as Section 42, the applicable section of the Internal Revenue Code ("IRC") See generally, 26 U.S.C. §42. The LIHTC program provides tax incentives to encourage

individual and corporate investors to invest in the development, acquisition, and rehabilitation of affordable rental housing. The tax credit is calculated as a percentage of costs incurred in developing the affordable housing property, and is claimed annually over a ten year period. The Framingham Housing Authority, a government entity exempt from federal tax liability, is not eligible to receive tax credits allowed under Section 42 of the Internal Revenue Code. Consequently, ownership of the Property had to be transferred to a limited liability company eligible to participate in the LIHTC (here, Musterfield Place, LLC) in order for the Framingham Housing Authority to negotiate a private equity investment in exchange for tax credits.

In this case, the Framingham Housing Authority utilized the regulatory scheme set forth in 760 C.M.R. 4.15-4.16 to transfer title to Musterfield Place, LLC. Thereafter, Musterfield Place, LLC was eligible to participate in the LIHTC program and to receive tax credits. Musterfield Place, LLC then assigned those tax credits to its investor-member in exchange for capital contributions used to help fund a substantial rehabilitation project for the Framingham Housing Authority. As emphasized herein, the transfer of title was

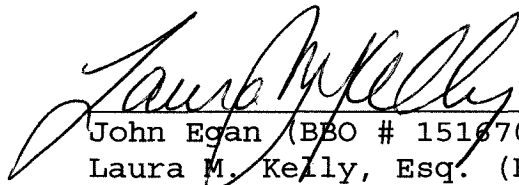
solely for the purpose of securing funding for a rehabilitation project. The Property has always been maintained, managed and controlled by the Framingham Housing Authority.

If it is determined that ch. 258 does not apply to "controlled affiliates," and that private investors, such as RESP Holding, LLC, the investor-member of Musterfield Place, LLC, seeking to invest in the development and renovation of public housing in exchange for tax credits under the LIHTC, are subject to unlimited tort liability, simply by taking title to a property over which they exercise no legal or actual control, this will act as a deterrent to private investors and will undermine the public policy goals of the LIHTC and Massachusetts regulatory scheme. Clearly, there is a strong public interest in providing quality public housing to low-income families and individuals. Any impediment or deterrent to encouraging private investors to assist in the development of public housing is contrary to the public interest and the legislative intent behind the LIHTC and Massachusetts regulations. Given the potential negative impact of the Superior Court's Order denying the Defendants' Motion for Partial Summary Judgment, on not only the Framingham Housing Authority's ability to utilize this regulatory

scheme in the future, but also on housing authorities across the Commonwealth, this legal issue is one of substantial public interest worthy of DAR.

Clearly, the Superior Court reported this matter to the Appeals Court because of the novelty and significant social impact of the legal issue at stake. The Appellants now petition the Supreme Judicial Court to review the issue and request that their application for DAR be allowed.

Respectfully Submitted,
Musterfield Place, LLC,
FHA Musterfield Manager LLC and
Framingham Housing Authority,
By their attorneys,



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Dated: August 4, 2017

Certificate of Service

I, Laura M. Kelly, hereby certify that I mailed a copy of the foregoing document on all counsel of record listed below on August 4, 2017 by regular, first-class mail and by electronic mail:

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